92-686

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

COUNTY OF INYO
and COUNTY OF INYO
on behalf of DANIEL P., a Minor

Petitioners,

v.

ROBERT GUTIERREZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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California
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QUESTION PRESENTED

1. Does federal law grant a state court jurisdiction to determine paternity against a reservation Native American where there is no tribal court and where the paternity issue arises in an action to pursue the collection of child support and AFDC reimbursement as part of the federally mandated child support enforcement program?

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Petitioner, the County of Inyo, State of California, and the County of Inyo on behalf of minor Daniel P., prays that a writ of certiorari issue to review the judgment and opinion of the State of

California Court of Appeal, Fourth District, Division Two, issued on April 29, 1992.

OPINIONS BELOW

The unpublished opinion of the California Court of Appeal, Fourth Appellate District, Division Two, appears as Appendix A.

The unpublished order of the California Supreme Court, denying discretionary review, appears as Appendix B.

JURISDICTION

Petitioner invokes the jurisdiction of this Court, under Title 28, United States Code, section 1257 (3) to review a judgment of the California Court of Appeal, Fourth Appellate District, Division Two, which was filed on April 29, 1992. The decision of the state intermediate appellate court is a final decision. The California Supreme Court,

on July 16, 1992, refused to exercise discretionary review of the intermediate state appellate court's decision. This petition is filed within the required 90-day period following the date of the highest state court's refusal to review. (See, American Railway Express Co. v. Levee, 263 U.S. 19, 20-21 (1923).)

STATUTORY, CONSTITUTIONAL, AND LOCAL COURT RULES INVOLVED

Title 28, United States Code, section 1360, states as follows:

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall

have the same force and effect within such Indian country as they have elsewhere within the State:

State of	*Indian country affected*
Alaska	All Indian country within the State
California . .	All Indian country within the State
Minnesota . .	All Indian country within the State, except the Red Lake Reservation
Nebraska . . .	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin . .	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal

treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

In Appendix C:

Title 18 U.S.C. section 1162.

Title 25 U.S.C. section 1902.

Title 42 U.S.C. section 601.

Title 42 U.S.C. section 602(a)(27).

Title 42 U.S.C. section 651.

Title 42 U.S.C. section 654(4)(A), (6)(A), (9)(A), (13).

Title 42 U.S.C. section 666(a)(5)(A)(i).

California Civil Code section 196(a).

California Civil Code section 248.

California Civil Code section 7006.

California Evidence Code section 892.

California Welfare and Institutions Code section 11350(a),(b).

California Welfare and Institutions Code section 11350.1(a).

California Welfare and Institutions Code section 11475.1(a).

STATEMENT OF THE CASE

In the California state trial court, a civil action was filed by petitioner, County of Inyo, and the County of Inyo on behalf of minor Daniel P., to obtain a determination of paternity and orders for ongoing child support and reimbursement of public assistance (Aid to Families with Dependent Children [AFDC]) against Respondent Robert Gutierrez. Petitioner also sought to compel respondent to submit to blood tests to determine paternity.

In the state trial court proceedings, respondent Gutierrez asserted as an affirmative defense that the state court and agencies lacked jurisdiction to establish paternity or enforce child support orders against him. Respondent alleged this was because he, the child and the child's mother, were members of a federally recognized Native American tribe, the Big Pine Band of Paiute-

Shoshone Native Americans, and resided on its reservation. Respondent denied that he was the father of Daniel P. Respondent did not present any evidence showing the Big Pine Band had a tribal court or any other mechanism to determine paternity.

Both petitioner and respondent asked the trial court to take judicial notice of the pleadings filed in another matter, County of Inyo v. Jeff, 227 Cal.App.3d 487, 277 Cal.Rptr. 841 (1991), review denied by the California Supreme Court on April 18, 1991. In Jeff, the same trial court found that a state court has jurisdiction to order a member of a federally recognized Native American tribe living on a reservation to reimburse the county for AFDC paid to support her child. The trial court's ruling in Jeff was affirmed by the same state intermediate appellate court involved here. In Jeff, the appellate court focused on the

jurisdictional grant over civil actions involving Native Americans given by Congress to California under Title 28, United States Code, section 1360(a). The appellate court reasoned that where the county is enforcing a private right to collect child support, the action can be considered as private in substance and thus within the jurisdiction of the state court under the authority of Title 28, United States Code, section 1360(a). (See, County of Inyo v. Jeff, supra, 227 Cal.App.3d 487, 277 Cal.Rptr. 841.)

In the instant matter against respondent Gutierrez, the state trial court incorporated its prior ruling in Jeff that AFDC reimbursement may be sought from Native Americans living on a reservation. From this prior ruling, and from the fact that the determination of paternity is an essential part of the collection of AFDC reimbursement, the

trial court concluded that blood tests may be used in determining paternity against a reservation Native American. Specifically, the trial court ruled that the provisions of California Evidence Code section 892 [Order for blood tests in civil action involving paternity] may be used in determining paternity against a reservation Native American.

In accordance with its ruling, the trial court ordered respondent Gutierrez to submit to blood testing. The blood tests indicated there was a 99.97% probability that respondent Gutierrez was the father of Daniel P. Based on this blood test evidence, the trial court decided respondent Gutierrez was the father of Daniel P. The trial court also found that respondent Gutierrez had the duty to support Daniel P. The trial court reserved the issue of the amount of child support.

An appeal was taken to the intermediate state appellate court by respondent Gutierrez. The Court of Appeal, Fourth Appellate District, Division Two, asked respondent Gutierrez to supplement the record on appeal with a copy of the Big Pine Paiute/Shoshone tribal ordinance. In response, Respondent Gutierrez filed a copy of the Tribal Constitution and Enrollment Ordinance. Those documents do not authorize the creation of a tribal court to deal with paternity issues or provide for any other mechanism to determine paternity. On April 29, 1992, the intermediate state appellate court issued its unpublished decision, reversing the judgment of paternity and order for reimbursement of child support. The intermediate state appellate court held that the determination of paternity is within the area of traditional tribal control and

that the trial court's exercise of jurisdiction to determine paternity against respondent Gutierrez interfered with tribal self-governance. The appellate court further held that a county seeking a declaration of paternity and reimbursement of welfare aid must first prove there is no tribal court or other mechanism that can decide the issue of paternity.

Petitioner County of Inyo filed a petition for review with the California Supreme Court, asking that it exercise its discretionary jurisdiction to review the decision of the intermediate state appellate court. By order dated July 16, 1992, California's highest court refused to grant review.

HOW THE FEDERAL QUESTION IS PRESENTED

The issue of jurisdiction of and regulation over Native Americans is a matter of federal law. (See, Public Law 280, codified at Title 18 U.S.C. section 1162 and Title 28 U.S.C. section 1360; see also, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); Rice v. Rehner, 463 U.S. 713 (1983).)

By reason of his status as a reservation Native American, respondent Gutierrez challenged the jurisdiction of the state trial court over the paternity action against him. His challenge was unsuccessful and the state trial court entered a judgment of paternity and order for reimbursement of child support against him. Respondent Gutierrez appealed from this judgment solely on the jurisdictional issue. While petitioner County of Inyo stressed that federal statutes granted the state trial court jurisdiction over the

paternity action and that the balancing of state, federal and tribal interests supported the exercise of such jurisdiction, the intermediate state appellate court agreed with respondent that the lower court lacked jurisdiction over this matter.

Petitioner County of Inyo timely filed a petition for review with the California Supreme Court, requesting that the state's highest court review the intermediate appellate court decision. Petitioner's request for discretionary review was denied by California's highest court. Petitioner now respectfully asks this Court to grant certiorari to address the jurisdictional issue presented in this matter.

ARGUMENT

FEDERAL LAW GRANTS A STATE COURT JURISDICTION TO DETERMINE PATERNITY AGAINST A RESERVATION NATIVE AMERICAN WHERE THERE IS NO TRIBAL COURT AND WHERE THE PATERNITY ISSUE ARISES IN AN ACTION TO PURSUE THE COLLECTION OF CHILD SUPPORT AND AFDC REIMBURSEMENT

In this state civil case, the California Court of Appeal, Fourth District, Division Two, reversed the judgment of paternity against respondent Gutierrez, holding that the trial court lacked subject matter jurisdiction. The state Court of Appeal held that the determination of paternity is within the area of traditional tribal control and that the trial court's exercise of jurisdiction to determine paternity against respondent Gutierrez interfered with "the tribe's ability to govern itself according to its own laws applicable to the area of domestic relations." (App. A-3.)

Petitioner submits the decision of the California appellate court is in error. The decision virtually emasculates the broad grant of jurisdiction given by Congress in Public Law 280 to California and other states over civil causes of action involving Native Americans. (See, Title 28 U.S.C. section 1360(a).) The decision also fatally conflicts with opinions of this Court explicating the balancing test of federal, state and tribal interests required to support the exercise of state jurisdiction over Native Americans. (See, Rice v. Rehner, 463 U.S. 713 (1983); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983).)

This Court should grant certiorari to clarify that a state trial court does have jurisdiction over paternity actions involving reservation Native Americans under the authority of Public Law 280, Title 28 United States Code section

1360(a). The resolution of this jurisdictional issue will impact not only this particular case, but potentially many other cases involving the establishment of paternity against reservation Native Americans in the State of California as well as in other Public Law 280 states. In the State of California alone, there are about 84 tribal organizations spread out in 27 counties throughout the state. Because the important jurisdictional question is bound to recur, a decision from this Court would provide necessary guidance to the state courts faced with paternity actions involving Native Americans.[1/]

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1. The jurisdictional issue presented here has been confronted by other states. The Court of Appeals of Minnesota--a Public Law 280 state like California--has a published decision on the issue: Becker County Welfare Dept. v. Bellcourt, 453 N.W.2d 543 (1990). In Becker, the paternity defendant, the mother and the child were all enrolled members of the Minnesota Chippewa Tribe and the White Earth Band of Chippewa

California is one of the states to which Congress has expressly granted jurisdiction over specified actions arising in Indian country within those states and involving Native Americans. Section 2 of Public Law 280 embodies the jurisdictional grant over criminal cases. (See, Title 18 U.S.C. section 1162.)

Native Americans and all three resided on the White Earth Reservation. The Minnesota Court of Appeal held that the state trial court had properly exercised jurisdiction pursuant to Public Law 280 over an action in which the defendant was declared to be the child's father and ordered to pay child support and AFDC reimbursement. The Court noted the constitution of the Minnesota Chippewa tribe did not authorize creation of tribal courts to deal with domestic relations matters. The Court recognized the tribe had a strong interest in self-governance and in determining the parentage of Native American children, but that "Congress cannot have intended there be no forum to execute the AFDC reimbursement program it mandates." (Becker, supra, 453 N.W.2d at p. 544.)

There are also cases from non-Public Law 280 states: New Mexico (State ex. rel. Dept of Human Services v. Jojola, 660 P.2d 590 (1983), cert. den. in 464 U.S. 803) and North Carolina (Jackson County v. Swayney, 352 S.E.2d 413 (1987), cert. den. in 484 U.S. 826).

Section 4 of Public Law 280, at Title 28 United States Code section 1360, expresses the jurisdictional grant over civil cases. In pertinent part, it provides as follows:

"Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State	*Indian country affected*
Alaska	All Indian country within the State
California . .	All Indian country within the State
Minnesota . . .	All Indian country within the State, except the Red

	Lake Reservation
Nebraska . . .	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin . .	All Indian country within the State (Title 28 United States Code section 1360(a).)"

From the sparse legislative history of this federal statute, this Court concluded that its intent was to redress the lack of adequate forums for resolving private legal disputes between reservation Native Americans, and between Native Americans and other private citizens by permitting the state courts to decide such disputes. (Bryan v. Itasca County, 426 U.S. 373, 383 (1976).) This Court construed section 1360(a) to grant states jurisdiction over private civil litigation involving reservation Indians in state court, but not to grant general civil regulatory activity. (Id., at pp. 385, 388-390.) Additionally, this Court stated that when a state tries to enforce a law

that is civil in nature on an Indian reservation under the authority of Public Law 280, the law is applicable only as it may be relevant to private civil litigation in state court. (California v. Cabazon Band of Mission Indians, supra, 480 U.S. at p. 208.)

The instant action falls squarely within the jurisdictional grant of Public Law 280. In compliance with both federal and state law, petitioner sought reimbursement for public welfare aid expenditures and future child support payments from respondent Gutierrez, the presumed father who had the obligation to support the minor on whose behalf welfare payments had been made. (See, Social Security Act, Title IV-D, Title 42, U.S.C. section 651 et seq.; California Civil Code sections 196(a), 248; California Welfare and Institutions Code, section 11350(a), (b).) Since a determination of paternity

is necessary for a proper consideration of the matters of child support and AFDC reimbursement (absent an admission or stipulation of paternity), petitioner also sought such a determination. The resolution of the paternity question was thus an integral part of the civil action filed by petitioner against respondent Gutierrez, a Native American.

That the action was brought by a governmental entity, the County of Inyo through its District Attorney, does not detract from the civil, private nature of the case. (See, California v. Cabazon, supra, 480 U.S. at p. 208.) Besides permitting public agencies such as the local prosecutor and the state Department of Social Services to bring an action to determine the existence of the father and child relationship, California law authorizes private parties such as a child, the child's natural mother, and the

presumed or alleged father to bring a paternity action. (See, California Civil Code, section 7006; California Welfare and Institutions Code, sections 11350.1(a), 11475.1(a).) Under California law, the minor or his mother or even respondent Gutierrez could have brought the instant paternity action. The fact it was the Inyo County prosecutor who instituted this action for Inyo County and on behalf of minor Daniel P. does not significantly distinguish this case from one where the litigation is solely between private parties. Accordingly, it is unquestionable that the paternity action here was relevant to private civil litigation and thus within the latitude of the jurisdictional grant of Public Law 280, Title 28 United States Code section 1360(a).

Further, it is clearly consistent with the legislative intent of Public Law

280 to permit the California state court to address the paternity issue in order to remedy the lack of an adequate Native American forum to resolve that question. Respondent never claimed there was a tribal court that could properly deal with the paternity issue. Respondent only claimed that merely because of his, the minor's and the mother's status as members and residents of a federally recognized Native American tribe, the state court lacked jurisdiction to decide paternity. The record is completely void of any evidence of a tribal court, law or mechanism on the Big Pine Band reservation which could determine the paternity of Daniel P. in order to allow petitioner to properly seek reimbursement of AFDC funds and child support. If the state trial court had not exercised jurisdiction over the paternity action, the issue of paternity would have remained unsolved

simply because there was no tribal court to handle the paternity question. If the state trial court lacked jurisdiction over this paternity action, petitioner would not be able to properly administer the AFDC program with its requirement of paternity establishment and enforcement of child support rights. (See, Title 42 U.S.C. sections 651, 654(4)(A), 654(6)(A), 654(9), 654(13), 666(a)(5)(A)(i).) That untolerable situation would be contrary to the jurisdictional grant of Public Law 280 and the federal statutes governing the administration of the AFDC program, which do not exclude Native American parents from state collection. The lack of a Native American tribunal to resolve the paternity issue thus lends further validity to the state court's exercise of jurisdiction as authorized by Title 28 United States Code section 1360(a).

It is evident that, because of the absence of a tribal court, there could be no jurisdictional conflict in the context of this case. Under these circumstances, it is inconceivable that the state appellate court found the determination of paternity interfered with tribal self-governance.

How can the appellate court find there is interference with tribal self-governance when it is evident that the tribe has no court or other forum to determine paternity? To reach its erroneous conclusion, the state appellate court turns to a statement -- not a holding -- made by this Court in a case involving negligence and breach of contract: Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877 (1986). In Wold, this Court invalidated a North Dakota law disclaiming the pre-existing, unconditional jurisdiction extended to

tribal Native Americans suing non-Indian defendants, and replacing it with an extension of jurisdiction conditioned on the tribe's waiver of its sovereign immunity and its agreement to the application of state law in all suits to which it was a party. The opinion provides in pertinent part as follows:

> "The North Dakota jurisdictional scheme requires the Tribe to accept a potentially severe intrusion on the Indians' ability to govern themselves according to their own laws in order to regain their access to the state courts. The statute provides that `[t]he civil jurisdiction herein accepted and assumed [upon Indian consent] shall include but shall not be limited to the determination of parentage of children, termination of parental rights, commitments by county courts, guardianship, marriage

contracts, and obligations for the support of spouse, children, or other dependents.' (N.D. Cent. Code, § 27-18-08 (Supp. 1985).) Although these subjects clearly encompass areas of traditional tribal control, see Fisher v. District Court, 424 U.S., at 388-389; United States v. Quiver, 241 U.S. 602 (1916), the North Dakota statute contemplates that state civil law will control in these areas." (Wold, supra, 476 U.S. at pp. 889-890.)

The cases cited in the above-quoted passage from Wold do not support the proposition that the determination of paternity is an area of traditional tribal control. Fisher v. District Court, 424 U.S. 382 (1976), merely holds that an adoption proceeding arising on the Northern Cheyenne Indian Reservation is within the exclusive jurisdiction of the

existing Tribal Court. United States v. Quiver, supra, deals with a criminal prosecution for adultery and the opinion states that bigamy, polygamy, incest, adultery and fornication are matters which have been left to the tribal custom and laws. (Quiver, supra, 241 U.S. at p. 605.)

In any event, this Court has held that even where a certain subject is within the area of traditional tribal control, federal law does not automatically place it outside the jurisdiction of the state courts. In Rice v. Rehner, 463 U.S. 713 (1983), this Court explained the analysis to be conducted against a "backdrop" of tribal sovereignty. When the Court determines that tradition has recognized a sovereign immunity in favor of the Native Americans in some respect, then the Court is usually reluctant to infer that Congress has authorized the assertion of state

authority in that respect, except where Congress has expressly provided that state laws shall apply. The Court does not favor repeal by implication of an established tradition of immunity or self-governance. However, if the Court does not find such a tradition or if it determines that the balance of state, federal and tribal interests so require, its pre-emption analysis may give less weight to the backdrop of tribal sovereignty. (Rice, supra, 463 U.S. at pp. 718-720; see Wold, supra, 476 U.S. at p. 884.)

This Court has also stated that:

"State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion

of state authority." (New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983).)

In Mescalero, this Court explained that substantial state interests arise when the state can point to " . . . functions or services performed by the State in connection with the on-reservation activity." (Id., at p. 336.) The state's interest is particularly substantial if the state can point to off-reservation effects that require state intervention." (Ibid.)

The Rice/Mescalero balancing of interests test supports the exercise of state court jurisdiction to establish paternity in order to seek reimbursement of AFDC payments against a reservation Native-American. The purpose of the federal AFDC program, under which the state is required to determine paternity

in order to enforce child support rights, is to:

> "[encourage] the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, ..." (Title 42 U.S.C. section 601.)

This purpose echoes that of the Indian Child Welfare Act (ICWA), which

deals with jurisdictional issues in certain proceedings involving Native American children -- custody, foster care and adoptive placement, but not the determination of paternity or child support. (See, Title 25 U.S.C. sections 1901 et. seq.) The express legislative purpose of the ICWA is to protect the best interests of the child and to promote the stability and security of Native American tribes and families. (Title 25 U.S.C. section 1902). This legislative policy is entirely consistent with the AFDC program and the federal interest in the establishment of paternity and enforcement of child support obligations.

The federal government and the state government are both involved in the AFDC program in what has been termed "`a scheme of cooperative federalism.'" (Shea v. Vialpando, 416 U.S. 251, 253 (1974), quoting King v. Smith, 392 U.S. 309, 316

(1968).) The AFDC program is financed largely by the federal government on a matching-fund basis; it is administered by the states. (Shea v. Vialpando, supra, at p. 253.) Federal law mandatorily requires the state to seek reimbursement of AFDC funds through the enforcement of the parent's child support obligation in order for the state to remain eligible for participation in the AFDC program. (See, Title 42 U.S.C. sections 651 et seq.) As part of the child support enforcement program, states are required, inter alia, to establish paternity and obtain child support. (See, Title 42 U.S.C. sections 602(a)(27), 654(4)(A), 654(6)(A).) Federal law requires states to establish paternity of children born out of wedlock on whose behalf AFDC payments are being made unless it is determined that it is against the best interests of the child to do so. (See, Title 42 U.S.C. section

654(4)(A).) Federal law further provides that paternity determination services shall be provided even in cases where AFDC aid is not being dispensed. (See, Title 42 U.S.C. section 654(6)(A).) Federal law further provides sanctions to the states for the failure to comply with these requirements. (See, Title 42 U.S.C. sections 603(h), 652(g) [Performance standards for State paternity establishment programs].)

It is evident that both the federal government and the state of California have a strong interest in the establishment of paternity. There is no reason for concluding that the determination of paternity of Native American children who receive AFDC benefits is excluded from the child support enforcement program. As pointed out above, the federal statutes mandating the establishment of paternity for AFDC

recipients provide for exceptions only in cases where such determination would be against the best interests of the child. This expressed concern for the best interests of the child is consistent with the purpose of the ICWA, noted above. In sum, petitioner submits the strong federal and state interests over the establishment of paternity in order to permit recoupment of AFDC benefits outweigh the Native American tribe's concern for self-governance.

Petitioner further submits any concern for tribal self-governance appears to be inappropriately invoked in this case. As already mentioned, the record is void of any indication that the tribe has a court or other mechanism available to make determinations of paternity. Under these circumstances, there is no possibility that the state would be unduly interfering with tribal sovereignty by

seeking a declaration of paternity in order to properly collect reimbursement for AFDC payments made on behalf of respondent's child.

In sum, petitioner urges this Court to grant certiorari to review the jurisdictional issue presented in this case and clarify that the California state court does have subject matter jurisdiction over a paternity action against a reservation Native American because of Public Law 280 and because of the balancing of the state, federal and tribal interests.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the writ of certiorari should issue to review the decision of the California Court of Appeal, Fourth District, Division Two.

Respectfully submitted,

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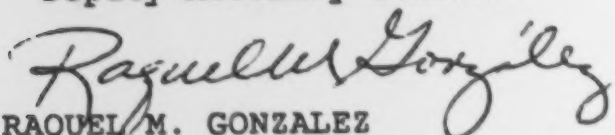

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COUNTY OF INYO, and
COUNTY OF INYO on
behalf of DANIEL P.,
a Minor
Petitioners.

v.

ROBERT GUTIERREZ,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being P.O. Box 85266, 110 West A Street, Suite 700, San Diego, California 92186-6174.

I have caused service of the within

PETITION FOR WRIT OF CERTIORARI AND APPENDICES

To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named below as follows: each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 14th day of October, 1992.

Honorable Don L. Chapman
County of Inyo
Inyo County Superior Court
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Fourth Appellate District
Division Two
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There is a delivery service by United States Mail and/or courier service at each place so addressed or regular communication by United States Mail and/or courier service between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, October 14, 1992.

Rosemary Carmona
ROSEMARY CARMONA

Subscribed and sworn to before me
this 14th day of October, 1992.

Anne Marie Buford
Notary Public in and for said County and State

ANNE MARIE BUFORD
Notary Public—California
County of San Diego
My Commission Expires 11/19/93

92-686

Supreme Court, U.S.
FILED
OCT 14 1992
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

COUNTY OF INYO
and COUNTY OF INYO
on behalf of DANIEL P., a Minor

Petitioners,

v.

ROBERT GUTIERREZ,

Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

NOT FOR PUBLICATION

Filed APR 29, 1992
Court of Appeal Fourth District

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

In re DANIEL P., a Minor.	
COUNTY OF INYO, et al., Plaintiff and Respondent,	E008636 (Super. Ct. No. 89-708)
v.	**OPINION**
ROBERT GUTIERREZ, Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Inyo County. Don. L. Chapman, Judge. Reversed.

California Indian Legal Services, by Lawrence R. Stidham, Dorothy Alther, Michael S. Pfeffer and Stephen V. Quesenberry, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Harley D. Mayfield,

Senior Assistant Attorney General, Rudolf Corona, Jr., Supervising Deputy Attorney General, Raquel M. Gonzalez, Deputy Attorney General, for Plaintiff and Respondent.

L. H. Gibbons, District Attorney, Family Support Division, by Linda Anisman, Deputy District Attorney, for Plaintiff and Respondent.

Robert Gutierrez (defendant) has appealed from the trial court's judgment fixing paternity and order reimbursement of child support. The judgment of paternity was incident to an action brought by the County of Inyo (plaintiff), seeking reimbursement of AFDC payments made for the benefit of Daniel P., the alleged minor child of defendant. Defendant contends that the trial court was without authority to determine the paternity of a Native American living on a reservation because determination of

paternity is an issue falling within the area of traditional tribal self-governance. The County of Inyo (plaintiff) argues that the state court does have the authority to make a paternity determination because such determination is a requisite condition precedent to the county's permissible collection of reimbursement of AFDC payments, an area in which state action against Native Americans is authorized.

We hold that the determination of paternity is an issue within the area of traditional tribal control, with the result that the trial court's determination of paternity here interfered with the tribe's ability to govern itself according to its own law applicable to the area of domestic relations. We shall reverse the judgment accordingly.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant, a Native American, is a member of the Big Pine Tribe and lives on the Big Pine Paiute/Shoshone Reservation. The Big Pine Tribe is a federally recognized tribe. The child, Daniel P., and his mother, Retha P., are also members of the Big Pine Tribe and live on the reservation.

After payments to Retha P., for the benefit of Daniel P., under the AFDC categorical aid program, plaintiff filed a complaint against defendant, seeking reimbursement of those payments, determination of defendant's paternity of Daniel P., together with an order of prospective child support. Defendant filed an answer, alleging the affirmative defense that state courts and agencies lacked subject matter jurisdiction either to establish paternity or to enforce state child support orders against members of a federally-recognized tribe who are

residents of a reservation. Defendant then filed an amended answer, in which he denied he was the father of Daniel P. and again alleged the affirmative defense that the state court lacked jurisdiction over the paternity issue.

Plaintiff then moved to compel a blood test and payment of temporary support, to which defendant filed opposition, once again raising the jurisdictional issue noted. The trial court granted the motion to compel the blood test and the motion for temporary support. The trial court based its ruling on this court's opinion in County of Inyo v. Jeff (1991) 227 Cal.App.3d 487. The court reasoned, because AFDC reimbursement may be sought from Native Americans living on a reservation and because determination of paternity is an essential part of the collection of reimbursement, that the provisions of Evidence Code section 892

(order for blood tests in civil actions involving paternity) may be permissibly applied in determining paternity even against a Native American living on a reservation.

The trial court then entered a judgment determining that defendant was the father of Daniel P. and owed him a duty of support. The court reserved the issue of the amount of child support. This appeal followed.

DISCUSSION

The assignment of error inherent in defendant's argument on appeal is that the trial court was without the authority to compel defendant, a Native American living on the reservation, to submit to a blood test and to make a determination of paternity based on the results of that blood test. This contention raises a pure question of law and is thus subject to this court's de novo review. (Stratton v.

First National Life Ins. Co. (1989) 210 Cal.App.3d 1071.) In our view, the trial court committed an error of federal proportions by granting plaintiff's motion to compel the blood test and by rendering a judgment of paternity thereon.

In plaintiff's complaint for reimbursement of AFDC payments and child support, plaintiff alleged the defendant was the father of Daniel P. In his answer, defendant asserted his status as Native American and denied paternity. For reasons stated below, before a motion to compel a bloodtest could be granted, it was incumbent on plaintiff to prove, in view of defendant's Native American status, that, rather than deferring the determination of paternity to a tribal court, the state court could permissibly adjudicate paternity.

"Deference to tribal courts in tribal affairs is a fundamental tenet of federal

jurisprudence. (United States v. Plainbull (Feb. 26, 1992) CV-89-193-JFB, 92 Daily Journal D.A.R. 2536.) The United States Supreme Court has recognized again and again the federal policy supporting tribal self-government. (See, e.g., Iowa Mutual Ins. Co. v. LaPlante (1987) 480 U.S. 9, 14; Three Affiliated Tribes v. Wold Engineering (1986) 476 U.S. 877, 890; Bryan v. Itasca County (1976) 426 U.S. 373, 387-389; Williams v. Lee (1953) 358 U.S. 217, 220.) The test for determining if a state court has the authority to adjudicate causes of action involving Native Americans has been set forth in Williams v. Lee (1959) 358 U.S. 217. The holding in Williams announced the "infringement test" for determining when state action interferes with the rights of Native Americans to govern themselves. In Williams, a non-Native American who operated a general store on a reservation,

brought suit in an Arizona state court to collect for goods he had sold to tribal members on credit. The Supreme Court held that the state court did not have authority to rule on the claim because, under the circumstances, the state court's action would infringe on the right of Native Americans living on a reservation to govern themselves. (Id. at p. 220.) (Emphasis added.)

More important to our analysis is the U.S. Supreme Court's explicit statement that the determination of paternity is a traditional area of tribal self-governance and thus not a matter for state court adjudication. Three Affiliated Tribes v. Wold Engineering (1986) 476 U.S. 877, 889. The Supreme Court in Wold examined a North Dakota statute which required Native Americans to disclaim tribal jurisdiction over a number of domestic relations matters in exchange for the right to sue a

corporation in state court for negligence and breach of contract. The statute provided for state civil jurisdiction over the determination of parentage, marriage contracts, and termination of parental rights, among other domestic relations matters. The high court stated, "Although these subjects clearly encompass areas of traditional tribal control [citations], the North Dakota statute contemplates that state civil law will control in these areas." (Id. at p. 889.) (Emphasis added.) The Supreme Court struck down the statute. The court rejected the idea that state law would control in the above areas in cases "that arise on the reservation, that involve only Indians, and that concern subjects which are within the jurisdiction of the tribal court." (Id. at p. 890.) The court concluded, "This result simply cannot be reconciled with

Congress' jealous regard for Indian self-governance. [Citations.]" (Id.)

In spite of the high court's explicit inclusion of paternity as being among areas of traditional tribal control, plaintiff contends that Wold does not support defendant's proposition that the determination of paternity is exclusively a tribal matter.[1/] Plaintiff argues, however, even if paternity is an area of traditional tribal self-governance, that the state's interest in determining paternity outweighs the interest of the

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1. Plaintiff argues that Wold is not relevant authority because its enumeration of domestic relations matters traditionally under the control of the tribes is followed by a citation to two cases which do not deal directly with paternity. The Wold opinion cites to Fisher v. District Court (1976) 424 U.S. 385. Fisher held that the Indian tribe had exclusive jurisdiction over an adoption proceeding. The other case, United States v. Quiver (1916) 241 U.S. 602, held that the tribe had exclusive jurisdiction over an adultery prosecution. This contention does not refute the court's explicit inclusion of paternity in its list.

Native American tribe. (See, Rice v. Rehner (1983) 463 U.S. 713 [if the court does not find an established tradition of self-governance, or if it determines that the balance of state, federal, and tribal interests so requires, the court may accord less weight to the "backdrop" of tribal sovereignty.]) The question posed by plaintiff in its brief exposes the way in which plaintiff has overlooked the traditional sovereignty of the tribe and the federal policy to guard this sovereignty, particularly in domestic relations matters. Plaintiff asks: "What valid interest could the tribe have in shielding appellant from his legal and moral obligation to support his child by preventing the state from pursuing a declaration of paternity in state court?"

Our ruling that the state court may not compel a blood test and determine paternity does not necessarily shield

defendant from his obligation to support his child. (See p. 12, infra.) Instead, the purpose of the ruling is to guard tribal self-governance in a traditional area of tribal control. Native American customs and traditions may dictate different approaches than those which the state may use, see Chino v. Chino (1977) 561 P.2d 476, and we are therefore vigilant against the destruction of tribal values and institutions. The rulings of two of our sister state courts provide further guidance.

The North Carolina Supreme Court has stated that "[t]he determination of paternity of an Indian child is of special interest to tribal self-governance, the right of reservation Indians to make their own laws and be governed by them. Such determination strikes at the essence of the tribe's internal relations." (Jackson Cty. Child Supp. Enforce. v. Swayney

(1987) 352 S.E.2d 413, 419.) That court reasoned that the state court's determination of paternity would create a risk of conflicting adjudication concerning respective rights of Native Americans living on the reservation and would determine the authority of the tribal court.

The Supreme Court of North Dakota has held that North Dakota did not have the authority to determine the paternity of Indian tribal members because paternity was a matter intimately connected with tribal self-governance. (McKenzie County Social Services (1986) 392 N.W. 399.) That court concluded, based on Williams v. Lee, supra, 358 U.S. 217, that the state court's ruling would undermine the authority of the tribal courts over reservation affairs and thus infringe on Indian self-government. (Id. at p. 402.)

In both of the above-cited cases, the tribal court was available to the parties for a determination of paternity. In support of its argument that the state court should determine paternity, plaintiff has stated in its brief on appeal and in documents before the trial court that there are no tribal courts operating on the Big Pine Paiute/Shoshone Reservation. No such facts were offered in evidence. The plaintiff's written statements do not constitute proof on this record that there is no tribal court or other tribal mechanism to which the plaintiff could present the issue of paternity for adjudication.

A plaintiff has the burden of pleading and proving every fact essential to the plaintiff's claim for relief. (See Evid. Code, § 500; 1 Witkin, Cal.Evidence, (3d Ed. 1985) § 133, p. 117.) Moreover, the burden of producing evidence as to a

particular fact is on the party against whom a finding on the fact would be required in the absence of further evidence. (Evid. Code, § 550.) Defendant was not required to prove the existence of the tribal court. "'The opponent whose case is a denial of the other party's affirmation . . . may legally sit inactive, and expect the proponent to prove his own case. Therefore, until the burden of producing evidence has shifted, the opponent has no call to bring forward any evidence at all. . . . [H]is failure to produce evidence cannot at this stage afford any inference as to his lack of it; otherwise the first party would virtually be evading his legitimate burden.' [Citation.]" (Vaughn v. Coccimiglio (1966) 241 Cal.App.2d 676, 678.) In order to prove the authority of the state court to proceed here, all plaintiff needed to have done was to present evidence that

there was not existing tribal mechanism. No such effort was made, and we cannot adjudicate the issue solely on supposition.

Furthermore, because plaintiff failed to produce evidence as to the existence of a tribal mechanism, it also failed to satisfy its burden of proof. (Evid. Code, § 115.) In sum, because the trial court's actions could not be sustained absent a showing that there was no tribal court or mechanism to determine paternity, plaintiff's effort must fail because this evidence is "essential to the claim for relief." (Evid. Code, § 500.) The motion to compel the bloodtest was thus impermissibly granted.

Certainly, once paternity is established in the appropriate forum, the trial court has the authority to adjudicate cases brought by the county pursuant to the requirement of the state

and federal AFDC program to collect reimbursement. This court settled this question in County of Inyo v. Jeff (1991) 227 Cal.App.3d 487. The issue resolved in the Jeff opinion, however, differs notably from the issue currently before this court. The participation of Native Americans in the state's welfare system is not traditionally a tribal matter. State courts, therefore, have authority to order collection for reimbursement of funds that the state has paid out. Here, however, the state has assumed authority over an area in which the tribe has traditionally had authority. Until proof is presented that no tribal mechanism is available, under the mandate of federal decisions, we can do naught but guard the tribal authority over paternity determinations.

Plaintiff next argues that this court's holding in Jeff, to the effect that the state courts have authority over

claims for AFDC reimbursement and child support, would be meaningless is state courts did not have the authority to determine paternity. Plaintiff argues further, citing the decision of the Minnesota Court of Appeal in Becker County Welfare Dept. v. Bellcourt (1990) 453 N.W.2d 543, that state courts must take jurisdiction over paternity determinations because Congress could not have intended that there be no forum to execute its mandated AFDC program. (Id. at p. 544.)[2/]

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2. Plaintiff also relies on State ex rel. Dept. of Human Serv. v. Jojola (1983) 660 P.2d 590 for support of this proposition. We note another part of the rationale of decision in Jojola with which we particularly disagree. " . . . To require the State of New Mexico to proceed to the various tribal courts of the State would defeat and be a burden on the aims of the public assistance program. Therefore, we find no interference with tribal self-government as long as DHS does not assert jurisdiction within the reservation." (Id. at p. 593.) Resort to the tribal courts may be a burden on the state but that burden does not negate the impermissible interference with the tribe in an area of "traditional tribal

Plaintiff's reasoning is flawed, if not specious. State court authority over AFDC collection does not necessitate state court authority over paternity. In view of the overriding federal and tribal interest in these circumstance, plaintiff must seek to secure a determination of paternity by means of a tribal mechanism. The determination of paternity from the tribe would have full force and effect in the county's action for collection of reimbursement for AFDC payments, pursuant to the section 25 of U.S.C. 1322(c) (Public Law 280) that provides for the "full force and effect" of any tribal ordinance or customs "heretofore or hereafter adopted by an Indian tribe . . . if not inconsistent with any applicable

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control." Jojola was decided before Three Affiliated Tribes v. Wold Engineering, supra, 476 U.S. 877.

civil law of the State."[3/] The application of this section of Public Law 280 "contemplates the continuing vitality of tribal government." (Bryan v. Itasca County (1976) 426 U.S. 373, 389.) If there is no tribal mechanism or if there

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3. Public Law 280, enacted by Congress in 1953 and emended in 1968, conferred criminal and limited civil jurisdiction of Indian country to California and five other states. The statute provides, in pertinent part: [¶] "(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action and those civil laws of such State that are of general application to private persons or property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . . [¶] California . . . all Indian country within the State. . . . [¶] (c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action pursuant to this section.

is actual tribal authorization for the state's action in this area, facts we will not assume, it is up to the plaintiff to make an affirmative showing that there is none. Until such a showing is made, the state court does not have authority to determine paternity.

We regret that a possible result of our ruling here may be that defendant will temporarily escape liability to reimburse plaintiff for AFDC payments made on behalf of Daniel P. We do not condone any neglect of parental responsibility to support a child by Native Americans or otherwise. As already stated, however, on this record, we must presume the existence of a Native American forum for determining paternity. If such a forum is available, we trust this issue will be there resolved with alacrity. If such forum is not available, we expect in future proceedings, that sufficient evidence will

be smartly produced so as to empower the state court to order a blood test of defendant and consequently to determine paternity with equal alacrity. In short, the issue of defendant's paternity of Daniel P. is not even remotely res judicata. We only hold that this time around plaintiff's efforts to establish it were short of the mark.

DISPOSITION

The judgment fixing paternity and ordering reimbursement of child support are reversed.

NOT FOR PUBLICATION

/s/ McDANIEL
J.*

We concur:

/s/ RAMIREZ
P. J.

/S/ McKINSTER
J.

*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

APPENDIX B

Fourth Appellate District, Division Two,
No. E008636
S026923

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

Supreme Court
filed
July 16, 1992
Robert Wandruf
Clerk
Deputy

In re DANIEL P., A Minor

COUNTY OF INYO Et Al., Respondents

v.

ROBERT GUTIERREZ, Appellant

Petition for review DENIED.
The request for an order directing publication of the opinion is denied.

/s/
Chief Justice

APPENDIX C

Title 18 U.S.C. section 1162:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction

may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.

California . . All Indian country within the State.

Minnesota . . .All Indian country within the State, except the Red Lake Reservation.

Nebraska . . . All Indian country within the State.

Oregon . . . . All Indian country within the State, except the Warm Springs Reservation.

Wisconsin . . .All Indian Country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or

community that is held in trust by the United States or is subject of a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

Title 25 U.S.C. section 1902:

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

Title 42 U.S.C. section 601:

For the purpose of encouraging the care of dependant children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy

dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children. Title 42 U.S.C. section 602(a)(27):

(a) "A State plan for aid and services to needy families with children must --

(27) "provide that the State has in effect a plan approved under part D of this subchapter and operates a child support program in substantial compliance with such plan;"

Title 42 U.S.C. section 651:

For the purpose of enforcing the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to all children (whether or not eligible for aid under part A of this subchapter) for whom such assistance is requested, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part.

Title 42 U.S.C. section 654(4)(A):

A state plan for child and spousal support must --

(4) provide that such State will undertake

(A) in the case of a child born out of wedlock with respect to whom an assignment under section 602(a)(26) of this title or section 1996k of this title is effective, to establish the paternity of such child, unless the agency administering the plan of the state under part A of this subchapter determines in accordance with the standards prescribed by the Secretary pursuant to section 602(a)(26)(B) of this title that it is against the best interests of the child to do so, or, in the case of such a child with respect to whom an assignment under section 1396k of this title is in effect, the State agency administering the plan approved under subchapter XIX of this chapter determines pursuant to section

1396k(a)(1)(B) of this title that it is against the best interests of the child to do so, and

Title 42 U.S.C. section (6)(A):

A state plan for child and spousal support must --

(6) provide that (A) the child support collection or paternity determination services established under the plan shall be made available to any individual not otherwise eligible for such services upon application filed by such individual with the State, including support collection services for the spouse (or former spouse) with whom the absent parent's child is living (but only if a support obligation has been established with respect to such spouse, and only if the support obligation established with respect to the child is being enforced under the plan)

Title 42 U.S.C. section 654(9)(A):

A state plan for child and spousal support must --

(9) provide that the State will, in accordance with standards prescribed by the Secretary, cooperate with any other State --

(A) in establishing paternity, if necessary,

Title 42 U.S.C. section 654(13):

A state plan for child and spousal support must --

(13) provide that the State will comply with such other requirements and standards as the Secretary determines to be necessary tot he establishment of an effective program for locating absent parents, establishing paternity, obtaining support orders, and collecting support payments;

Title 42 U.S.C. section 666(a)(5)(A)(i):

In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:

(5)(A)(i) Procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday.

California Civil Code section 196(a):

(a) The father and mother of a child have an equal responsibility to support and educate their child in the manner suitable of the child's circumstances, taking into consideration the respective earnings or earning capacities of the parents.

California Civil Code section 248:

The obligee may enforce his right of support against the obligor and the county may proceed on behalf of the obligee to enforce his right of support against the obligor. Whenever the county furnishes support to an obligee, it has the same right as the obligee to whom the support was furnished, for the purpose of securing reimbursement and of obtaining continuing support. The right of the county to reimbursement shall be subject to any limitation otherwise imposed by the law of this state. The court may order the obligor to pay the county reasonable attorney fees and court costs in any proceeding brought by the county pursuant to this section.

California Civil Code section 7006:

(a) A child, the child's natural mother, or a man presumed to be the child's father under paragraph (1), (2),

or (3) of subdivision (a) of Section 7004, may bring an action as follows:

(1) At any time for the purpose of declaring the existence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004.

(2) For the purpose of declaring the nonexistence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

(b) Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship

presumed under paragraph (4) of subdivision (a) of Section 7004.

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7004 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. Such an action shall be consolidated with a proceeding pursuant to subdivision (b) of Section 7017 if a proceeding has been filed under Section 7017. The parental rights of the alleged

natural father shall be determined as set forth in subdivision (d) of Section 7017.

(d) Except as to cases coming within the provisions of Section 621 of the Evidence Code, a man not a presumed father may bring an action for the purpose of declaring that he is the natural father of a child having a presumed father under Section 7004, if the mother relinquishes for, consents to, or proposes to relinquish for or sent to, the adoption of the child. Such an action shall be brought within 30 days after the man is served as prescribed in subdivision (f) of Section 7017 with a notice that he is or could be the father of the child or the birth of the child, whichever is later. The commencement of the action shall suspend any pending proceeding in connection with the adoption of the child under a judgment in the action is final.

(e) Regardless of its terms, an agreement between an alleged or presumed father and tne mother or child does not bar an action under this section.

(f) An action under this section may be brought before the birth of the child.

(g) The district attorney may also, at his or her discretion, bring an action under this section in any case in which the district attorney believes it to be appropriate.

California Evidence Code section 892:

In a civil action which paternity in a relevant fact, the court may upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved, and shall upon motion of any party to the action made at a time so as not to delay the proceedings unduly, order the mother, child, and alleged father to submit to such tests, the court may resolve the question of paternity against

such party or enforce its order if the rights of others and the interests of justice so require. Any party's refusal to submit to such tests shall be admissible in evidence in any proceeding to determine paternity.

California Welfare and Institutions Code section 11350(a),(b):

(a) In any case of separation or desertion of a parent or parents from a child or children which results in aid under this chapter being granted to such family, the noncustodial parent or parents shall be obligated to the county for an amount equal to the following:

(1) The amount specified in an order for the support and maintenance of such family issued by a court of competent jurisdiction; or in the absence of such court order, the amount specified in paragraph (2).

(2) The amount of support which would have specified in an order for the support

and maintenance of the family during the period of separation or desertion provided that any such amount in excess of the aid paid to the family shall not be retained by the county, but disbursed to the family.

(3) The obligation shall be reduced by any amount actually paid by such parent during the period of separation or desertion for the support and maintenance of such family.

(b) The district attorney shall take appropriate action pursuant to this section in the superior court of the county which provided aid under this chapter

California Welfare and Institutions Code section 11350.1(a):

(a) Notwithstanding any other statute, in any action brought by the district attorney for child support of a minor child or children, the action may be prosecuted in the name of the county on

behalf of the child, children, or caretaker parent. The caretaker parent shall not be a necessary party in the action but may be subpoenaed as a witness. In an action under this section there shall be no joinder of actions, or coordination of actions, or cross-complaints, and the issues hall be limited strictly to the question of paternity, if applicable, and child support, including an order for medical support. A final determination of parentage may be made in any action under this section as an incident to obtaining an order for support. An action for support or paternity pursuant to this section shall not be delayed or stayed because of the pendency of any other action between the parties. Judgment in an action brought pursuant to this section, and in an action brought pursuant to Section 11350, if at issue, may be rendered pursuant to a

noticed motion, which shall inform the defendant that in order to exercise his or her right to trial, he or she must appear at the hearing on the motion.

If the defendant appears at the hearing on the motion, the court shall inquire of him or her if he or she desires to subpoena evidence and witnesses, if paternity is at issue and blood tests have not already been conducted whether he or she desires blood tests, and if he or she desires a trial. If his or her answer is in the affirmative, a continuance shall be granted to allow him or her to exercise those rights. Unless the case is determined to be complex as defined in paragraph (2) of subdivision (e) of Section 11475.1, the continuance shall not postpone the hearing to more than 75 days from the date of service of the summons and complaint. In the event that a continuance is granted, the court may make

an order for temporary support without prejudice to the right of the court to make an order for temporary support as otherwise allowed by law.

California Welfare and Institutions Code section 11475.1(a):

(a) Each county shall maintain a single organizational unit located in the office of the district attorney which shall have the responsibility for promptly and effectively establishing, modifying, and enforcing child support obligations, including medical support, enforcing spousal support orders established by a court of competent jurisdiction, and determining paternity in the case of a child born out of wedlock. The district attorney shall take appropriate action, both civil and criminal, to establish, modify, and enforce child support and when appropriate enforce spousal support orders when the child is receiving public assistance, including Medi-Cal, and, when

appropriate, to take the same actions on behalf of a child who is not receiving public assistance, including Medi-Cal.

Supreme Court, U.S.
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No. 92-686

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

COUNTY OF INYO

and COUNTY OF INYO

on behalf of DANIEL P., a Minor,

Petitioner,

vs.

ROBERT GUTIERREZ,

Respondent,

On Petition For A Writ Of Certiorari

BRIEF FOR RESPONDENT IN OPPOSITION

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Question Presented

The State of California's formulation of the question presented is inaccurate. For the reasons stated herein, the State's Petition does not meet this court's standards for discretionary review and should be denied.

Statement of the Case

The court of appeal presumed that the Big Pine Paiute-Shoshone Tribe had a forum for determining paternity issues involving its members. See State's Appendix A, page 22. This presumption is consistent with this courts preference for tribal forums when domestic relations involving reservation Indians are involved. See Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989), Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 887 (1986).

Rather than holding that no tribal forum existed to resolve paternity disputes, the court held that no facts were offered in evidence to refute the presumption that a tribal forum existed. See State's Appendix A, page 15. Since the State had the burden of pleading and proving every fact essential to its claim for relief, its failure to do so required the court of appeal to hold that the superior court had no subject matter jurisdiction. See State's Appendix A, pages 17-19.[1]

Argument

THE QUESTION PRESENTED BY THE STATE'S PETITION DOES NOT MEET THIS COURT'S STANDARDS FOR DISCRETIONARY REVIEW.

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1. "In order to prove the authority of the state court to proceed here, all plantiff needed to have done was to present evidence that there was not existing tribal mechanism. No such effort was made, and we cannot adjudicate the issue solely on supposition." See State's Appendix A, pages 16-17.

Rules of the Supreme Court, Rule 10, discusses the considerations governing review of a Petition for a Writ of Certiorari. Rule 10.1(c) states the considerations for review of state court decisions.

> When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of the court.

In light of these considerations, it is clear this court should deny the State's Petition for Writ of Certiorari.

First, the decision by the Fourth District Court of Appeal was not certified for publication. California Rules of Court, Rule 977(a) states clearly that an opinion not ordered published "shall not be cited or relied on by a court or a party in another action...." Since the court of appeal's decision affects only the specific parties in this case, it cannot control other California cases involving paternity determinations of reservation Indians. Despite the State's arguments to the contrary, it is free to present its jurisdictional arguments in any other case raising these issues. The present case is not citable authority and does not provide an appropriate vehicle for the resolution of any important question of federal law.

Second, the holding of the appellate court does not conflict with any applicable decision of this court. The State argues that the decision "virtually emasculates the broad grant of jurisdiction given by Congress in Public Law 280 to California"

(page 16 of Petition for Writ of Certiorari). This statement is based on the erroneous conclusion that Public Law 280 divested tribes of their traditional control over the domestic relations of its tribal members. This court has held otherwise. See Bryan v. Itasca County Minnesota, 426 U.S. 373 at 383-90 (1976).

In Bryan v. Itasca County Minnesota, Id. at 384, this court held that Public Law 280's grant of civil jurisdiction (25 U.S.C. § 1322(a), 28 U.S.C. § 1360(a)) does not confer "general state civil regulatory control over Indian reservations" and does not divest tribes of their inherent and traditional control over their members. This court also noted that nothing in the legislative history of Public Law 280 "remotely suggests that Congress meant the Act's extension of civil jurisdiction to the states should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than private, voluntary organizations" (Bryan, supra, at 389). See also California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207-12 (1987).

The court of appeal's decision is therefore consistent with this court's preference for tribal forums when resolving issues involving reservation Indians and its view that Public Law 280 does not divest California tribes of their traditional inherent authority to regulate the domestic relations of their members. Since there can be no doubt that paternity is a domestic relations matter (Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, supra, United States v. Quiver,

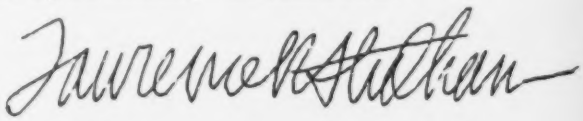
241 U.S. 602 (1916), and Fisher v. District Court, 424 U.S. 385 (1976)), the court of appeal's decision correctly adheres to the decisions of this court. Therefore, the State's Petition should be denied.

Conclusion

The decision of the court of appeal for the Fourth District of the State of California was not certified for publication. As an unpublished decision, it cannot be cited as authority in any other case involving a paternity determination of reservation Indians. The State of California will have the opportunity to argue its position if and when such a case arises. However, even if the decision was citable authority, it is consistent with this court's decisions protecting and preserving the inherent authority of Indian tribes in domestic relations matters.

For these reasons, the State of California's Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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